Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor

COURT OF APPEAL (KUCHING) — CIVIL APPEAL NO Q–02–541 OF 1996
MOKHTAR SIDIN, MOHD GHAZALI AND NIK HASHIM JJCA
24 DECEMBER 2004

Contract — Construction of term of contract — Loan — Whether the word 'shall' in agreement was mandatory — Whether the words 'any sum due' include interest

Banking — Banker and customer — Fixed loan — Whether bank can withhold further drawdown when interest was not paid for amount released — Whether customer entitled to damages for loss suffered

Banking — Loan — Guarantee — Demand for payment — Whether demand letters sent by prepaid post pursuant to letter of guarantee considered properly served on guarantors

The first appellant, intending to construct 10 units of four-storey shop houses on lots 247 to 256 Section 49 Kuching Town Land District ('the project land') which was then together with four other parcels of land ('the other lands') charged to a bank, applied to the first respondent for a loan facility to finance the purchase price of the said lands and the construction cost. Following the application and subsequent negotiation between them, the respondents through the first respondent by its letter of offer dated 3 May 1985 ('the offer') offered a fixed loan of RM5.2 million to the first appellant. Legal documents were prepared and executed by the parties namely, the Loan Agreement dated 17June 1985, Memoranda of Charge covering the project land and the other lands and Letter of Guarantee executed by Kho Kak Siew (an undischarged bankrupt at the time of trial), Kho Kak Soon (second appellant) and Kho Kak Hee (third appellant). Thereafter on the application of the first appellant, the first drawdown comprising RM3.8 million were released to the first appellant. As early as 1985, the first appellant has defaulted in the servicing of the monthly interest. Consequent upon the first appellant's default in servicing of the monthly interest, the respondents withheld the drawdown of the balance of the loan of RM1.4 million. In the action before the learned trial judge, the respondents were claiming to recover from the first appellant the sum of RM2,231,213.43 and interests being the shortfall sum after the first appellant and the other chargors had redeemed the land titles which had been charged to the respondents. The first appellant in turn counterclaimed against the respondents for damages for breach of the terms of the Letter of Offer and the Loan Agreement. The second and third appellants were sued as guarantors for the first appellant. The learned trial judge gave judgment in favour of the respondents. Hence, this appeal by the appellants rests essentially on three core issues. They were: (i) whether it was mandatory to service monthly interest as provided in s 8.01 of the Loan Agreement and item 8 of the Letter of Offer

dated 3 May 1985; (ii) whether the failure to pay interest can be considered as an event of default under s 16.01(i)(a) or (b) of the Loan Agreement thus entitling the respondents to withhold drawdown under s 6.02(f) of the Loan Agreement; and (iii) whether any proper demand had been made on the guarantors.

Held, dismissing appellants' appeal with costs:

(1) The word '*shall*' appearing in the section clearly supports that s 8.01 is mandatory in its terms (see *Mat Yassin bin Dollah v Ibrahim bin Hussin & Anor* [1997] 2 MLJ 681). Thus, strict compliance with its provision is called for as the parties themselves had agreed to the terms which were then embodied into the Loan Agreement. Accordingly, under the terms of s 8.01 and item 8 of the Letter of Offer, it was therefore mandatory for the first appellant to service monthly interest in arrears (see para 16).

(2) The learned High Court judge was right in his finding that the failure to service the interest on monthly basis comes within the scope of events of default under s 16.01. The words 'any sum due' under s 16.01(1)(a) mean to include interest. Such being the case, the first appellant's complaint over the withholding or delay in releasing the draw downs by the respondents was not without justification. The respondents did not refuse to allow drawdowns to be made to the first appellant. The respondents merely required fulfillment of conditions of drawdowns before releasing drawdowns to the first appellant. That course of action adopted by the respondents was prudent and which every banker and lender would adopt in order to protect their interests. In that event, the respondents were not in breach of the Letter of Offer and the Loan Agreement (see para 21).

(3) If it was the intention of the parties that there be no need to service the loan by payment of monthly interest in arrears, then the Loan Agreement would surely not have been drawn up and executed in the format as it now exists. If that was the intention, then the whole loan of RM5.2 million would have been released to the first appellant and the first appellant would only be required to pay the RM5.2 million with interest thereon at the end of the loan period. But that was not the intention or arrangement in the instant case (see para 22).

(4) The second and third appellants did not deny that they were not in receipt of the demand letters. They did not give evidence at the trial. Thus, since the letters of demand were sent to the second and third appellants by prepaid post to their addresses pursuant to cl 10 of the Letter of Guarantee, the said letters were considered properly served on them. The court agreed with the learned High Court judge that proper demand letters were given to the second and third appellants in line with the decision in *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610. Hence, by the Letter of Guarantee, they were liable as guarantors to the first appellant (see para 29).

[**Bahasa Malaysia summary**

Perayu pertama, yang berhasrat untuk membina 10 unit rumah kedai empat tingkat atas lot-lot 247 hingga 256 bahagian 49 Tanah Daerah Bandar Kuching ('tanah projek tersebut') yang pada masa itu bersama dengan empat bidang tanah lain ('tanah-tanah lain') dicagarkan ke sebuah bank, telah memohon kepada responden pertama untuk satu kemudahan pinjaman bagi menampung harga belian tanah-tanah tersebut dan kos pembinaan. Berikutan permohonan tersebut dan perbincangan seterusnya antara mereka, responden-responden menerusi responden pertama melalui surat tawarannya bertarikh 3 Mei 1985 ('tawaran tersebut') telah menawarkan satu pinjaman tetap sejumlah RM5.2 juta kepada perayu pertama. Dokumen-dokumen sah telah disediakan dan disempurnakan oleh pihak-pihak iaitu, perjanjian pinjaman bertarikh 17 Jun 1985, memorandum gadaian melibatkan tanah projek tersebut dan tanah-tanah lain dan surat jaminan yang disempurnakan oleh Kho Kak Siew (seorang bankrap yang belum dilepaskan pada masa perbicaraan), Kho Kak Soon (perayu kedua) dan Kho Kak Hee (perayu ketiga). Selepas itu, atas permohonan perayu pertama, pinjaman pertama sejumlah RM3.8 juta telah diberikan kepada perayu pertama. Seawal tahun 1985, perayu pertama telah gagal membayar faedah bulanan. Berikutan kegagalan perayu pertama membayar faedah bulanan, responden-responden telah menahan baki pinjaman sejumlah RM1.4 juta. Dalam tindakan di hadapan hakim perbicaraan, responden-responden telah menuntut untuk mendapat balik daripada perayu pertama sejumlah RM2,231,213.43 berserta faedah yang merupakan jumlah yang perlu dibayar setelah perayu pertama dan penggadai-penggadai lain melepaskan hak milik tanah yang digadaikan kepada responden-responden. Perayu pertama telah menuntut balas terhadap responden-responden untuk ganti rugi kerana perlanggaran terma-terma surat tawaran dan perjanjian pinjaman. Perayu-perayu kedua dan ketiga telah disaman sebagai penjamin-penjamin bagi pihak perayu pertama. Hakim perbicaraan telah memberikan penghakiman menyebelahi responden-responden. Justeru itu, rayuan ini oleh perayu-perayu khususnya berdasarkan tiga persoalan utama. Berikut adalah: (i) sama ada ia adalah mandatori untuk membayar faedah bulanan sebagaimana yang diperuntukkan dalam s 8.01 perjanjian pinjaman dan butiran 8 surat tawaran bertarikh 3 Mei 1985; (ii) sama ada kegagalan untuk membayar faedah boleh dianggap sebagai satu kegagalan di bawah s 16.01(i)(a) atau (b) perjanjian pinjaman dan oleh demikian memberi hak kepada responden-responden untuk menahan pelepasan wang di bawah s 6.02(f) perjanjian pinjaman; dan (iii) sama ada apa-apa tuntutan telah dibuat dengan betul ke atas penjamin-penjamin tersebut.

Diputuskan, menolak rayuan perayu-perayu dengan kos:

(1) Perkataan '*shall*' yang terdapat dalam seksyen tersebut menunjukkan dengan jelas bahawa s 8.01 adalah mandatori (lihat *Mat Yassin bin Dollah v*

Ibrahim bin Hussin & Anor [1997] 2 MLJ 681). Oleh itu, pematuhan ketat dengan peruntukan tersebut adalah penting kerana pihak-pihak telah bersetuju dengan terma-terma terkandung dalam perjanjian pinjaman. Sewajarnya, di bawah terma-terma s 8.01 dan item 8 surat tawaran, ia adalah mandatori untuk perayu pertama membayar faedah bulanan yang tertunggak (lihat perenggan 16).

(2) Hakim Mahkamah Tinggi yang bijaksana adalah betul dalam penemuan beliau bahawa kegagalan untuk membayar faedah setiap bulan jatuh dibawah skop kegagalan mematuhi perjanjian di bawah s 16.01. Perkataan-perkataan 'any sum due' di bawah s 16.01(1)(a) bermaksud termasuklah faedah. Oleh yang demikian, aduan perayu pertama tentang penahanan atau kelewatan melepaskan wang oleh responden-responden bukanlah tanpa justifikasi. Responden-responden tidak menolak untuk membenarkan pelepasan pinjaman dibuat kepada perayu pertama. Responden-responden hanya mengkehendaki perayu-perayu memenuhi syarat pinjaman sebelum melepaskan pinjaman kepada perayu pertama. Proses tindakan yang digunakan oleh responden-responden adalah wajar dan setiap pegawai bank atau peminjam akan lakukan bagi tujuan melindungi faedah mereka. Dalam keadaan sedemikian, responden-responden tidak melanggar surat tawaran dan perjanjian pinjaman tersebut (lihat perenggan 21).

(3) Sekiranya adalah niat pihak-pihak agar tidak perlu membayar bayaran faedah bulanan yang tertunggak, maka perjanjian pinjaman sememangnya tidak perlu dibuat dan disempurnakan dalam format sedia ada. Sekiranya itulah niat mereka, maka keseluruhan pinjaman sejumlah RM5.2 juta harus dilepaskan kepada perayu pertama dan perayu pertama hanya perlu membayar RM5.2 juta berserta faedah di penghujung tempoh pinjaman tersebut. Namun itu bukan niat atau aturannya dalam kes semasa (lihat perenggan 22).

(4) Perayu-perayu kedua dan ketiga tidak menafikan yang mereka tidak menerima surat-surat tuntutan tersebut. Mereka tidak memberi keterangan semasa perbicaran. Oleh itu, memandangkan surat-surat tuntutan tersebut telah dihantar kepada perayu-perayu kedua dan ketiga melalui pos pra bayar, surat-surat tersebut dianggap telah disampaikan dengan betul kepada mereka ke alamat-alamat mereka menurut fasal 10 kepada surat jaminan. Mahkamah bersetuju dengan hakim Mahkamah Tinggi bahawa surat tuntutan yang betul telah diberikan kepada perayu-perayu kedua dan ketiga selaras dengan keputusan dalam *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610. Justeru itu, melalui surat jaminan tersebut, mereka bertanggungjawab sebagai penjamin-penjamin kepada perayu pertama (lihat perenggan 29).]

Notes

For cases on banking generally, see 1 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1580–1975.

For cases on construction of term of contract on loan, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2783–2785.

Cases referred

Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76 (distd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62 (refd)

Gopal Das & Anor v Sri Thakurji & Ors AIR 1943 PC 83(refd)

Lloyd v Lloyd (1837) 2 My & Cr 192 (refd)

Malayan Banking Bhd v Dr Betharajoo a/l Krishnasamy [2000] 3 MLJ 391 (refd)

Mat Yassin bin Dollah v Ibrahim bin Hussin & Anor [1997] 2 MLJ 681 (folld)

Mok Hin Wah & Ors v United Malayan Banking Corp Bhd [1987] 2 MLJ 610 (folld)

Lee Chuan Eng (Ee & Lim) for the appellants.

Stanley Eddy (Battenberg & Talma) for the respondents.

Nik Hashim JCA (delivering judgment of the court):

BACKGROUND

[1] This appeal came up before us on 27 September 2004. At the conclusion of arguments for the appellants we found it unnecessary to call upon the respondents for a reply and therefore dismissed the appeal with costs and ordered the deposit be paid towards the account of taxed costs. We now give our reasons.

[2] The brief facts of this case are as follows. The first appellant, intending to construct 10 units of four-storey shophouses on lots 247 to 256 Section 49 Kuching Town Land District (the project land) which was then together with four other parcels of land (the other lands) charged to a bank, applied to the first respondent for a loan facility to finance the purchase price of the said lands and the construction cost. Following the application and subsequent negotiation between them the respondents through the first respondent by its letter of offer dated 3 May 1985 (the offer) offered a fixed loan of RM5.2 million to the first appellant to be disbursed as follows:

(i) RM2.5 million to be released to the chargee for the redemption of the titles to the project land and the other lands;

(ii) RM600,000 to be paid to the vendor of the project land in settlement of the purchase price;

(iii) RM700,000 to be released to the first appellant for the costs of the construction of the said shophouses;

(iv) RM1.4 million to be released progressively against 60% of the architect's certificate of works done on the project land.

[3] Legal documents were prepared and executed by the parties namely, the Loan Agreement dated 17 June 1985, Memoranda of Charge covering the project land and the other lands and Letter of Guarantee executed by Kho Kak Siew (an undischarged bankrupt at the time of trial), Kho Kak Soon (second appellant) and Kho Kak Hee (third appellant).

[4] Thereafter on the application of the first appellant, the first drawdown comprising the sums in paras 2(i), 2(ii) and 2(iii) totaling RM3.8 million were released to the first appellant.

[5] However, problems between the first appellant and the respondents arose in connection with the subsequent drawdowns applied for by the first appellant on the RM1.4 million.

[6] The total release and drawdown made to and by the first appellant was a sum of RM4,737,239.99 from the loan of RM5.2 million. As at 31 May 1993, the first appellant had repaid a sum of RM6,745,172.15 to the respondents. But as early as 1985, the first appellant has defaulted in the servicing of the monthly interest.

[7] Consequent upon the first appellant's default in servicing of the monthly interest, the respondents withheld the drawdown of the balance of the loan of RM1.4 million.

[8] The dispute between the first appellant and the respondents culminated in the action before the learned trial judge. The respondents were claiming to recover from the first appellant the sum of RM2,231,213.43 and interests being the shortfall sum after the first appellant and the other chargors had redeemed the land titles which had been charged to the respondents. The first appellant in turn counterclaimed against the respondents for damages for breach of the terms of the Letter of Offer and the Loan Agreement. The second and third appellants were sued as guarantors for the first appellant.

[9] The learned trial judge gave judgment in favour of the respondents. Hence, this appeal by the appellants.

[10] Before us, learned counsel from both sides relied on their respective written submissions to support their arguments.

ISSUES

[11] Having perused their written submissions, we found their arguments centered essentially on three core issues that merit our consideration. They are:

(i) whether it was mandatory to service monthly interest as provided in s 8.01 of the Loan Agreement and item 8 of the Letter of Offer dated 3 May 1985;

(ii) whether the failure to pay interest can be considered as an event of default under s 16.01(i)(a) or (b) of the Loan Agreement thus entitling the respondents to withhold drawdown under s6.02(f) of the Loan Agreement; and

(iii) whether any proper demand had been made on the guarantors.

FINDINGS

[12] With regard to the first issue whether servicing monthly interest under the Loan Agreement is mandatory, it is pertinent to reproduce the relevant sections for our consideration. Section 8.01 provides:

> The borrower *shall* pay interest on the advances and on the loans from time to time outstanding monthly in arrears on each interest payment date at the rates applicable thereto as hereinafter provided as from the respective drawdown dates of the advances the first of such payments to be made at the end of the month in which the first drawdown is made and subsequent payments to be made every one (1) month thereafter. Interest for any period less than a year shall be calculated on the basis of actual days elapsed divided by 365. (Emphasis added.)

[13] Whereas with respect to late payment s 8.04 states:

> If the borrower fails to pay any amount in accordance with this agreement, the borrower shall pay interest on that amount from the time of default up to the time of actual payment (as well after as before judgment) at the rate of three per centum (3%) per annum above the prescribed rate or at such other rate or rates as the agent may stipulate from time to time such interest to be chargeable on a daily balance basis until settlement of such sums in default.

[14] And this is what the learned judge said on ss 8.01 and 8.04:

> Having considered the wordings of s 8.01 I am inclined to agree that it is mandatory in nature. And I cannot accept that it can be subject to s 8.04. There is nothing to indicate that. Moreover, I am fortified by item 8 of the Letter of Offer dated 3May 1985 (Exh P1, page 1) '(which states: Repayment: servicing of monthly interest in arrears. Full principal and interest repayment or by redemption of titles not later than eighteen (18) months from the date of the first drawdown. The redemption sum shall be $550,000 per unit or proportionate to the total amount outstanding at the time of redemption, whichever is higher.)' It is obvious under item 8 that servicing of the monthly interest in arrears was expected. Even DW1 under cross-examination admitted that as early as 1985 the first defendant was already in breach of the loan agreement due to the default in paying the interest on the first release made on the 26 June 1985. In view of such an admission I find it puzzling for DW1 to now say that s 8.01 is not mandatory.

[15] We agreed with the learned judge. It has been accepted that for the construction of commercial documents, such as one in this case, the paramount concern is to discover the intention of the parties from the terms therein contained. *Chitty on Contracts* (25th Ed) Vol 1 at para 766 emphasises:

> *Intention of the parties*. The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say, the meaning of the document or of a particular part of it is to be sought *in the document itself*: 'One must consider the meaning of the words used, not what one may guess to be the intention of the parties.

[16] Lord Cottenham LC in *Lloyd v Lloyd* (1837) 2 My & Cr 192 said: 'If the provisions are clearly expressed, and there is nothing to enable the court to put upon them a construction different from that which the words import, no doubt the words must prevail.' In our view, the words in s 8.01 are clearly expressed and unambiguous that there can be no other construction possible than the one which was held by the learned judge. The word 'shall' appearing in the section clearly supports that s 8.01 is mandatory in its terms (see *Mat Yassin bin Dollah v Ibrahim bin Hussin & Anor* [1997] 2 MLJ 681). Thus, strict compliance with its provision is called for as the parties themselves had agreed to the terms which were then embodied into the Loan Agreement. Accordingly, under the terms of s 8.01 and item 8 of the Letter of Offer, it is therefore mandatory for the first appellant to service monthly interest in arrears.

[17] The second issue to consider is whether the failure to service the monthly interest amounts to an event of default under s 16.01 of the Loan Agreement and thereby justifying the respondents to withhold or delay the release of the drawdown from the RM1.4 million.

[18] 'Event of default' under s 2.01 (1) is defined to mean any of the events or states of affairs specified in s 16.01 which provides:

> Events of Default
>
> (1) The agent may, by written notice to the borrower declare that the commitments shall be cancelled, whereupon the same shall be cancelled and accrued commitment fee shall become due and payable and/or declare the principal, interest and all other sums payable under this agreement to be forthwith due and payable, whereupon the same shall become so payable, if:
>
> (a) the borrower fails to pay *any sum due* under this agreement or the charge on due date; or
>
> (b) the borrower makes default under any other provision of this agreement or the charge which is not capable of remedy or which, being capable of remedy, is not remedied within 30 days after notice to the borrower from the agent requesting action to remedy the same; or
>
> (c) …;

(d) …;
(e) …;
(f) …;
(g) …
(h) …;
(i) ….

[19] Whereas Article VI, ss 6.01 and 6.02 provide the conditions precedent for the drawdowns. In particular, s 6.02 sets down the conditions precedent for second and subsequent drawdowns which stipulates:

> In addition to the provisions of s 6.01 the several obligations of the lenders to make their proportion of the second and subsequent drawdowns available shall also be subject to the fulfillment of the following conditions precedent:
>
> (a) …;
> (b) …;
> (c) …;
> (d) …;
> (e) …;
> (f) No event of default and no event which with the giving of notice and/or lapse of time and/or a determination made under the relevant section would constitute an event of default having occurred at the date on which the relative drawdown notice is delivered to the agent and at the date of such advance.

[20] With respect to the second issue, the learned trial judge opined as follows:

> On reading s 16.01(1)(a) and (b) it is my considered opinion that the failure to service the interest on monthly basis comes within the scope of events of default. If therefore there was a default then the plaintiffs (respondents) could rely on s 6.02 in refusing or delaying any releases as what happened in this case. I noted that before finally allowing the first release from the RM1.4 million the outstanding interest had to be paid by deducting from the sum paid. And DW1 testified that he agreed to the deduction…

[21] Thus, to our mind, the learned judge was right in his finding that the failure to service the interest on monthly basis comes within the scope of events of default under s 16.01. We are of the further view that the words '*any sum due*' under s 16.01(1)(a) mean to include interest. Such being the case, the first appellant's complaint over the withholding or delay in releasing the drawdowns by the respondents was not without justification. The respondents did not refuse to allow drawdowns to be made to the first appellant. The respondents merely required fulfillment of conditions of drawdowns before releasing drawdowns to the first appellant. That course of action adopted by the respondents was prudent and which every banker and lender would adopt

in order to protect their interests. In that event, the respondents were not in breach of the Letter of Offer and the Loan Agreement.

[22] If it was the intention of the parties that there be no need to service the loan by payment of monthly interest in arrears, then the Loan Agreement would surely not have been drawn up and executed in the format as it now exists. If that was the intention, then the whole loan of RM5.2 million would have been released to the first appellant and the first appellant would only be required to pay the RM5.2 million with interest thereon at the end of the loan period. But that was not the intention or arrangement in the instant case.

[23] Much reliance was placed by the first appellant on the Federal Court case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76 to support its contention that the respondents were in breach of the Loan Agreement when they withheld or delayed in releasing the drawdowns.

[24] In *Bank Bumiputra*, Edgar Joseph Jr SCJ at p 78 held, *inter alia*, that the bank was in breach of contract when it treated the term loan as on demand loan and recalled it prematurely, before its rights accrued. The learned judge also held that if the typescript words and the printed words can be read together and be given a reasonable meaning, the contract of loan is construed as an on demand loan, and the borrower was entitled to some reasonable time to repay. In this case, there was no evidence that the bank had carried out a final periodical survey and then given MP (the borrower) a reasonable time for repayment before calling the overdraft facility and on this ground also, the bank was in breach of agreement and consequently MP is entitled to damages.

[25] From the foregoing judgment, these facts are distinguishable from the instant case:

(i) in *Bank Bumiputra*, the facility was an overdraft facility; in the instant case it is a term loan, serviceable by monthly repayment of interest and can be recalled if any breach is committed by the borrower and is not remedied or can be recalled at the expiry of the availability period;

(ii) in *Bank Bumiputra*, the loan was recalled prematurely; in the instant case, the action to recover the loan was taken on after the availability period had lapsed on 31 Decemeber 1987 and the first appellant had not drawdown or fully utilized the loan before the expiry of the availability period;

(iii) in *Bank Bumiputra*, the learned judge at p 86 para D stated that nowhere in exh P2 is it said that the first respondent was required to pay the interest monthly or at any other intervals; in the instant case, by s 8.01 of the Loan Agreement it is unequivocally stated that the first appellant was required to pay monthly interest in arrears;

(iv) in the instant case, the action was not one based on a recall of loan prematurely but based on the Loan Agreement whereby the respondents was suing for the shortfall;

(v) in *Bank Bumiputra*, the first respondent claimed for loss of profit, exemplary damages and damages paid to third party; these items were proven; in the instant case, no such heads of damages were pleaded and proved.

[26] Thus, from the facts stated above, we are of the view that the ratio decidendi and the facts of the *Bank Bumiputra* cannot be applied to the instant case.

[27] With regard to the third issue, the second and third appellants submitted that there was no proper demand made on them, and as such, they were not liable as guarantors to the first appellant. With respect, we were unable to agree with them. In the present case, evidence was adduced that the letters of demand (P1 (p6)) and the AR Cards (P7 and P8) were sent to the second and third appellants prior to the action. Subsequently, the AR Cards with signatures indicating the receipt were returned. These letters of demand and the AR Cards were produced and marked as exhibits. At the trial, learned counsel for the second and third appellants, however, did not raise any objection at all to the mode of proof of P1 (p6), P7 and P8 when they were tendered in evidence through PW2 (see pp 157 to 158 vol 2 of the appeal record). *Sarkar's Law of Evidence* (15th Ed) at p 1075 said:

> Once a document is properly admitted the contents would stand admitted in evidence and if no objection has been raised with regard to its mode of proof at the stage of tendering in evidence such a document, no such objection could be allowed to be raised at any later stage of the case or in appeal.

(see also *Malayan Banking Bhd v Dr Betharajoo a/l Krishnasamy* [2000] 3 MLJ 391).

[28] As such, in our opinion, the learned judge was right in admitting P1 (p 6), P7 and P8 as evidence without formal proof of their authenticity having to be established. P1 (p 6), P7 and P8 were properly admitted. Therefore, their admissibility in evidence could not now be objected to by the second and third appellants in the appeal. His Lordship Gopal Sri Ram JCA in delivering the judgment of the court in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 referred to the Privy Council's decision in *Gopal Das & Anor v Sri Thakurji & Ors* AIR 1943 PC 83 at p 87, where Sir George Rankin, when delivering the advice of the Board said:

> Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forth-coming had it been insisted on at the trial.

[29] In this case, the second and third appellants did not deny that they were not in receipt of the demand letters. They did not give evidence at the trial. Thus, since the letters of demand were sent to the second and third appellants by prepaid post to their addresses pursuant to cl 10 of the Letter of Guarantee, the said letters were considered properly served on them. We therefore agreed with the learned judge that proper demand letters were given to the second and third appellants in line with the decision in *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610. Hence, by the Letter of Guarantee, they were liable as guarantors to the first appellant.

[30] It is worthy of note that the guarantees by the second and third appellants (who were the directors of the first appellant) were given in consideration of the respondents granting loan facility to the first appellant. Since there was no breach of the Loan Agreement on the part of the respondents, the failure of consideration as alleged by the second and third appellants therefore did not arise. Consequently, there was no basis for the appellants' counterclaims. They were rightly dismissed.

[31] In the event, we made the orders accordingly.

Appeal dismissed with costs.

Reported by AG Kalidas